

*Case #3419 (11/1/97)*

**AMERICAN EXPRESS TRAVEL RELATED SERVICES, INC.**

**American Express Card**

*Ogilvy & Mather/New York, NY*

- **NAD will use its experienced judgment to determine what express and implied claims have been made in the advertising at issue, both in the presence and absence of communications studies.**
- **Although humor is not a defense for inaccurate representations, the use of humor can determine whether any claim is actually being made about a competitor or not.**
- **When a comparative claim is made about an entire product/service category and that category is identified by a trademark, the claim must be accurate as to 100% of the products/services in the category.**

**Basis of Inquiry:** Visa U.S.A. (“Visa”), Bank of America (“BA”) and Citicorp Credit Services, Inc. (“Citibank”) challenged television and print advertising for the American Express Card, a credit card of American Express Travel Related Services, Inc. (“Amex”). These three challengers expressed essentially the same concerns and arguments. The inquiry was, therefore, considered as a single challenge for the purposes of determining claim support.

Two :60 commercials presented the misadventures of one particular traveler who journeys to Paris in one spot, and the Grand Canyon and Las Vegas in the other.

*Paris:* (NB: This commercial was broadcast on all three major television networks. While the action and copy were the same, the supers differed from network to network.)

Man: (handing a frequent flyer mileage summary to an airline ticket agent) “Good Morning. I’d like to cash in my miles for one ticket to Paris, France.”

Agent: “I’m sorry sir, your miles have expired.”

Man: (on phone with Visa representative) “I’ve been charging on my Visa card for years to earn this trip. I found that I have to pay for the ticket?” [Super #1: “Certain Visa cards earn miles that do not expire.”] [Super #2: “Certain issuers’ Visa cards earn miles that do not expire.”]

Man: (hands Visa card to ticket agent) “Ha ha, it happens. Paris.”

Agent: (SFX: electronic beeps; computer screen reads ‘Over Limit’) “Visa says you’re over your limit.”

Man: (handing cash to agent) “Visa. It’s everywhere you want to be.” (man takes ticket and runs amok through airport, knocking over luggage and into people, to catch flight)

Man: (inside airplane as it arrives in Paris) “Paris. Have I told you what I’ve been through?” (man open up overhead compartment and suitcase falls on his head)

Man: (sitting with French security guards, has blurry vision, scrolls down a French phrase book, passes over the phrase for “I need a doctor,” and speaks with a poor accent to the security guards using the next phrase) “Je suis un espion.”

[English subtitle as seen in foreign language films: “I am a spy”]

Security Guards: “Espion?”

Man: (nodding in agreement, believing he chose the doctor option ) “Espion.”

Security Guards: “Espion!” (security guards hit a button, a red light blinks, an alarm sounds and other security guards rush in to man’s shock and surprise)

Man: (sitting inside jail cell wearing hand and ankle manacles, his belt secures a handkerchief bandage around his head, and he holds a telephone to his ear with his shoulder.) “But Visa says they’re everywhere.”

[Super #1: “Medical and legal referrals not available through Visa Classic cards.”]

[Super #2: “Medical and legal referrals not available through most Visa Classic cards.”]

Voice Over: (man sitting in same position) “Visa says its everywhere, but American Express helps you with just about everything.

Three messages in large, on-screen text, each one displayed separately:

“No pre-set spending limit.”

“Mileage points that never expire.”

“Emergency medical & legal referrals.”

[Super below the three messages: Enrollment in Membership Rewards program required. Purchases approved on factors such as account history, credit record and personal resources. Global Assist Hotline.]

Voice Over: (art card with American express cards and Amex logo) “So you can always do more.”

[Large, on-screen text: “do more”]

American Tourist: (passing a comment after the man, now out of jail, hobbles past, still wearing the hand and ankle manacles) “I do not get French fashion.”

*Steve & Eydie:*

Man: (setting up a camera for a timer shot at the Grand Canyon) “I’m the luckiest man alive.”

(Video: SFX honking horn of bus, bus hits camera, camera smashes into man’s forehead; man speaks to Visa representative on cell phone)

Man: “I just bought this camera.” (cut to close-up shot of blue Visa card being pulled out of his wallet) “Does my Visa card have some kind of purchase coverage or something? No?”

[Super: “Purchase protection not available on most Visa Classic cards.”]

(Video: man swings his jacket over his shoulder and his wallet flies out over a cliff and into the canyon)

Man: “Oh boy! Hey does Visa have any place out here where I can pickup a new card today? No? But I’m driving to Vegas to see Steve and Eydie tonight!”

(Video: man in convertible car driving on highway)

Radio Announcer in Car: “Visa It’s everywhere you want to be.”

(Video: man turns radio off, sees bus ahead, tries to pass bus and, turning his head, notices it belongs to Steve and Eydie)

Man: Wow!

(Video: still passing bus, man turns his face ahead to see a bunny rabbit in road ahead of his car; he swerves to avoid the rabbit, goes off road and continues to drive on dirt; he is still parallel with bus so Steve can see him)

Steve Lawrence: "What was that?"

(Video: man driving off road)

Voice Over: "Visa says they're everywhere, but American Express helps with just about everything."

[Three messages in large, on-screen text:

'Automatic Purchase Protection'

"1700 travel service locations"

"Rental car insurance"]

[Super below insurance message: "Rental car insurance not available on most Visa Classic cards."]

Eydie: (looking out the window) "You think we should get help?"

Steve: (looking at the bottle of champagne he is opening rather than out the window) "Nope. I got it.

Voice Over: (art card with American express cards and Amex logo) "So you can always do more.

[Large, on-screen text: "do more"]

Man: (billboard falls on his car) "Unbelievable!"

Steve: (Steve and Eydie laugh) "Unbelievable!"

Ten print advertisements were also challenged: five black and white; five color. Each features a photo of an American Express card and a "generic" Visa card. Above each card is copy about one of the benefits of the American Express Card offers and the Visa card's woeful response. In total, there are five benefit comparisons. The only difference between the color and black and white versions is the line below the cards: in the color versions it states, "Visa says they're everywhere, but American Express helps you with just about everything," and "Visa says they're everywhere but isn't it more important to have a Card that helps you with just about everything?" appears in the black and white versions. Below both lines is the Amex logo, the phrase "do more," an instruction on how to apply for the American Express Card by phone and the Internet address.

The benefit comparisons are:

American Express: "No preset spending limit." Footnote: "American Express Cardmember purchases approved based on a variety of factors including account history, credit record and personal resources.

Visa: "Restrictive spending limit, but bird hologram provides hours or entertainment."

American Express: "Earns you mileage points that never expire." Footnote: "Enrollment in the Membership Rewards<sup>5</sup> program from American Express required."

Visa: Miles that can expire before you know it, but hey, world travel is overrated anyway"

American Express: "Emergency legal referrals anywhere in the world." Footnote: Global Assist® Hotline from American Express. Information on Visa obtained from largest issuers of Visa cards."

Visa: "No legal referrals, but sturdy plastic can be used to tunnel out of jail."

American Express: “Emergency medical referrals anywhere in the world.” Footnote: Global Assist® Hotline from American Express. Information on Visa obtained from largest issuers of Visa cards.”

Visa: “No medical referrals, but rounded corners for safety.”

American Express: “Over 1700 Travel Service locations worldwide.”

Visa: “Have we mentioned the hologram?”

**Challengers’ Positions:** The challengers maintained that the campaign as a whole was inaccurate on two levels: 1) that while Visa card benefits are determined by the individual issuers (approximately 6000 of them), the campaign claims attribute them to the Visa brand as one single entity as if all Visa cards carry (or lack) the same benefits; and 2) even if such a comparison were not inaccurate, the claims about the benefits were because the advertising targeted all Visa cards, not just Classic. As to the second level of the challenge, the challengers maintained the advertising made a number of inaccurate claims:

- a. the version of *Paris* stating that “Medical and legal referrals not available through Visa Classic cards” was expressly false;
- b. both *Paris* and *Steve & Eydie* implied that card enhancements are determined by Visa rather than individual issuing institutions;
- c. *Paris* implied that:
  - all Visa mileage programs involve points that expire;
  - American Express card holders do not face the possibility of having a transaction refused for being over the credit limit and Visa cardholders are more likely to have a purchase turned down; and
  - medical and legal referrals are not available through Visa cards (all versions);
- d. *Steve & Eydie* implied that:
  - Visa cards (all versions) do not offer purchase protection;
  - Visa cards (all versions) do not offer rental insurance; and
  - Visa cardholders who lose their cards (all versions) will not be helped;
- e. the print advertisements concerning mileage, medical referrals and legal referrals were expressly false;
- f. the print advertisements concerning preset spending limit implied that American Express cards do not have credit limits; and
- g. the print advertisements concerning the 1700 travel service locations imply that Visa issuers don’t offer service to their card holders who lose their cards.

Comparison to the Visa brand instead of the individual issuers: The challengers characterized the Amex campaign as being “suffused with gratuitous disparagement of Visa’s name and trademarks” that “unfairly casts Visa in a negative light.” Visa explained that Amex is a “closed-ended payment system provider” that issues cards, signs up merchants, processes payment transactions and bills card holders, whereas Visa is an association of member banks that processes payment transactions and sets minimum brand-wide standards for the issuers. Visa does not issue cards, bill cardholders, sign up merchants or determine which card enhancements will be offered by issuers; that is all done by the issuing banks. The challengers emphasized that “there is no generic Visa card,” since each of the more than 6000 participating banks may design and offer its own set of card benefits, and Amex’s competition is

not the Visa system but with the individual card issuers (emphasis in original). Therefore, the challengers concluded, Amex inappropriately attacked the entire Visa system and brand as to card benefits that are not inherent in the system and brand when it should have limited its comparisons to system-wide issues.

The challengers also maintained that it was incorrect to assume that viewers would not automatically look on the comparison as being limited to the Visa Classic card because Amex used the name “Visa” throughout the advertising without any qualifier or limitation, and depicted a generic Visa card that consumers have no way of identifying as a Classic card.

#### *Benefit Claims:*

Visa’s communications studies: In support of its assertions that the commercials created the inaccurate impressions about Visa cards noted above, Visa provided communications studies of both commercials. It also argued that viewers would not know that the benefit claims made in these advertisements related only to the Visa Classic card as only a small percentage identified the Visa card in the commercial as a Classic card.

Specific benefit claims: Visa stated that “[e]ach of the enhancements claimed by American Express(i.e., legal referrals, medical referrals, miles that do not expire, purchase protection, customer service and car rental insurance) is available with one or another Visa branded credit card - Gold cards as well as Classic cards,” and that there were millions of Visa cards that have been issued that offer the enhancements Amex claims Visa doesn’t have. On the other hand, the challengers argued, a consumer watching the commercials would conclude from the experiences of the commercials’ main character that none of the benefits cited were available from a Visa card. Visa also maintained that depicting the “consequences to a consumer of using a particular product must be substantiated as typical of what consumers can expect [but that] the protagonist’s experiences are not.

As to the individual card enhancements, the challenger also noted the following:

- **Mileage programs:** Visa maintained that none of the Visa-affiliated airline mileage programs involves redemption at the gate and four offer mileage that never expires. Moreover, since airline co-branded cards comprise less than 2% of all Visa cards and Visa does not control any of the programs, “the association of Visa with expired airline miles is not even relevant to 98% of all Visa cards” and inaccurate as to the other 2%. They asserted that the super in the commercial “Certain Visa cards earn miles that do not expire,” was ineffective and an inappropriate attempt to correct a false claim rather than explain or clarify a message. Visa also argued that this comparison compounded the inappropriateness of the comparison to a “generic” Visa card (since there is none) in that the basic American Express Card does not come with a mileage feature; cardholders have to sign up and pay separately for a special mileage program to earn frequent flyer miles.
- **Credit limits:** Visa stated that the credit limits imposed by its institutions were determined on the same factors that Amex used and that it was the American Express Card user that was more likely to be surprised by a transaction refusal for credit reasons because the Visa cardholder is informed of his/her credit limit in advance.
- **Legal and medical referrals:** The challenger maintained that the jail scene implied that Visa won’t help cardholders to find a lawyer or physician while abroad. They maintained the broadcast and print claims concerning these benefits were explicitly false as to all 85 million Visa Gold cardholders, 2.9 million Visa commercial cardholders and approximately 500,000 Visa Classic cardholders from a number of banks. Therefore, they concluded, the super, “Medical and legal referrals not available through Visa Classic cards,” was also false on its face.

Visa also argued that this comparison was distinguishable from “a generalized superiority claim (e.g., ‘our product is softest’)” that is based on testing 85% of the market including the leading brands. The difference is that this comparison involves a trademark, i.e., named competition, making any inaccuracy meaningful and expressly false.

Moreover, the “leading bands” in this case include Citibank, the largest Visa issuer, and BA, both of which offer all the benefits mentioned when including Visa Gold cards.

- **Purchase Protection:** NAD was advised that a number of Visa issuers offer purchase protection, including the largest issuer of Visa cards, Citibank, which has issued nearly 16 million Visa Classic cards with that benefit. The challengers argued that the disclaimer, “Purchase protection not available on most Visa Classic cards,” was ineffective as to Classic cards and inaccurate as to all Visa Gold and Commercial cards inasmuch as they offered that benefit.

- **Lost cards:** Visa indicated that the emergency number VISA-91 1 was available to help those with lost cards, that normal replacement of Visa Gold cards is within 24 hours in the U.S., normally one business day for Visa Classic cards, and that some issuers such as Citibank offer same-day replacement at many branches. The challengers also maintained that the nearest Amex service location to the Grand Canyon is Flagstaff, AZ or Las Vegas, NV a drive of four hours to both, making the replacement of a card lost in the canyon unavailable.

- **Car rental insurance:** The challengers asserted that the disclaimer, “Rental car insurance not included on most Visa Classic cards,” was false as to all Visa Gold cards and as to certain issuers of Classic cards, including BA, that offered it.

Concerns specific to BA and Citibank: Because BA and Citibank are individual issuers of Visa cards, they expressed additional concerns that didn’t relate to the Visa system. They indicated that by focusing the comparison on the Visa brand, the campaign affects the playing field against BA and Citibank because consumers will have been told by Amex that no Visa card offers the benefits of the American Express card, including those offered by BA and Citibank despite the fact that one or more of their respective Visa cards offers these programs.

**Advertiser’s Position:** Amex maintained that its advertising was a truthful and accurate comparison between Amex’s basic green American Express Card and Visa Classic cards, that it reasonably supported its claims that the basic attributes of the American Express Card are not available on the “vast majority” of Visa Classic cards, and that where exceptions existed they were clearly noted.

The advertiser’s support included an analysis of the top 25 Visa card issuers that, collectively, offered 78% of all Visa cards in force. This analysis indicated which issuers, if any, offered purchase protection, car rental insurance, emergency medical and legal referrals, an airline program, the mileage expiration policy of each program and the number of cards issued by each institution offering these respective benefits and programs.

Comparison to the Visa brand instead of the individual issuers: The advertiser asserted that its advertising was responsive to more than ten years of Visa advertising that disparaged the American Express Card, and that the overall theme of its campaign was that it is worth carrying the American Express Card because it offers a “combination of valuable features” that aren’t available to most Visa Classic cardholders. Moreover, it noted, the Visa campaign regularly depicted a generic Visa card without an issuer’s name. Amex also maintained that which entity determined card enhancements was immaterial to the advertising’s focus, i.e., educating consumers about the differences in benefits available to the holders basic American Express and Visa cards. Nevertheless, it argued, it expressly disclosed that the benefits “may vary among Visa Classic cards.”

Amex also asserted that its advertising was about comparable products, Visa Classic cards and American Express Cards, and the fact that issuers offer any one or more of the benefits in connection with Visa Gold or other cards was irrelevant. It emphasized that Visa has a separate, distinct advertising campaign for Visa Gold cards, that Visa Gold cards have a different brand identity, they look different (they are Gold, not blue) and the campaign touts different card benefits, some of which are offered by the basic American Express Card. On the other hand, Amex used the same generic blue Visa Classic card that Visa uses in its Classic campaign. Recognizing that different issuers offered different combinations of benefits, services and programs, the advertiser noted that it used what it

considered “precise language” to disclose, where appropriate, that not all Visa cards were the same by avoiding general statements about issuers and employing explanatory language referring to “certain” or “most” Visa Classic cards and issuers.

### ***Benefit Claims.’***

Visa’s communications studies: Amex argued that it was Visa’s own decade old campaign against the American Express Card that had created a fictional universal Visa card in the minds of consumers. Therefore, it was not surprising that respondents used the name “Visa” when responding to the challenger’s questions. Moreover, it argued, the structure of the survey questions about “Visa” presupposed answers about “Visa.” The advertiser was concerned that Visa did not offer complete data about the surveys such as methodology, coding procedure or supervisor and interviewer instructions. It also argued that both tests were flawed for failing to test for preconceptions about Amex and Visa (exhibited in responses to questions about “Visa” and American Express Cards that concerned ““availability of the card”” even though this was not a subject of the commercials), and aggregating open-ended “main idea” questions and directed questions creating an inflated result about “confusion.”

Specific benefit claims: Amex maintained that the commercials implied that the comical character could have avoided his credit card-related problems by using the American Express Card rather than the basic Visa card, using humor to make the point, not shield claims. The advertising emphasizes that the system-wide mandates of Visa do not provide the same minimums as Amex and that it was entirely likely that one would get a basic Visa card with none of the benefits offered by Amex.

As to the individual card enhancements, the advertiser also noted the following:

- **Mileage programs:** Amex identified ten issuers offering mileage programs with different airlines whose accumulated mileage expired. Four banks offered programs with other airlines whose mileage didn’t expire. Of the ‘Visa Classic cards in circulation that are affiliated with mileage programs, 70% involved miles that expired. Amex argued that a literal falsehood was not made at all, that the super explains the claim of the on-camera action, and the only claim the commercial makes on this subject is that it is “possible” to earn miles that don’t expire with a Visa Classic card but “impossible” for American Express card miles to expire. It also noted that Visa has disseminated advertising about what that challenger describes in its own ads as “Visa airline programs.

Acknowledging that the print advertising does not contain any additional information regarding the availability of mileage that doesn’t expire with Visa programs, the advertiser emphasized that since 70% of mileage program cardholders were affiliated with those that do expire and the advertisements state that “Miles can expire” the advertising was expressly accurate. (emphasis in original) This was particularly so given that a Visa Classic cardholder would more than likely find his/her miles will eventually expire.

- **Credit limits:** Amex noted that every Visa card has a specified credit limit when the account is established whereas Amex does not impose any such pre-set spending limit on its cardholders. That very existence of a preset limit can result in the rejection of a transaction in excess of the limit “rather than a review of a variety of factors including a cardmember’s account history, credit record and personal resources.” The advertiser also argued that since an American Express Card transaction is not depicted in Paris, it couldn’t imply that its cardholders didn’t face the possibility of a refusal. Similarly, which cardholder is more likely to have a purchase turned down is not a subject of the advertising. Finally, a cardmember’s surprise at being turned down can happen to anyone who mistakenly believes that there is credit left on his/her account.

- **Legal and medical referrals:** None of the top 25 issuers offers emergency medical referrals with its Visa Classic card, and only BA and Provident offer legal referrals to Classic cardholders but they charge a fee for that service. Amex emphasized that Visa acknowledged that only 500,000 of 133 million Visa Classic cardholders, less than one third of one percent, have access to these benefits, and that such an amount is so small it “does not negate the super

used on two of the three television networks (“Medical and legal referrals not available through Visa Classic cards”) as a “general statement.” It argued that since all Visa Gold cardholders had these benefits, it evidenced that the issuers regard them as a “premium cardholder service” while Amex included them as basics.

- **Purchase Protection:** Amex noted that among the top 25 issuers, only Citibank offers purchase protection with its Visa Classic card, and argued that it was, therefore, reasonable to assume that purchase protection was not likely to be offered with a Visa Classic card.

- **Lost cards:** The advertiser maintained that although institutions issuing Visa Classic cards have systems to help their customers who lose cards, “the Visa system has limitations” i.e., no Travel Service Locations whereas Amex has 1700 Travel Service Locations, throughout the world offering a variety of services. Acknowledging that its character was in the Grand Canyon, Amex indicated that an Amex Travel Service Location was located from within a two hour drive (to Flagstaff, AZ) to no more than later the same day (to Las Vegas).

- **Car rental insurance:** Amex noted that only two of the 25 top Visa issuer banks offered car rental insurance to all their Visa Classic cardholders and that Citibank offers it only to its Visa Classic cardholders enrolled in its airline program (about 13% of Citibank Visa cardholders). It argued that the commercial pointed out the obvious about the respective level of Visa Classic issuers that do offer this enhancement, i.e., that most do not.

## DECISION

**Summary of Decision:** NAD concludes that:

a) claims about “Visa” card benefits are not inaccurate;

b) none of the *Paris* commercials imply that:

- all Visa mileage programs involve points that expire;
- American Express cardholders face less of a possibility of having a transaction refused and that Visa cardholders are more likely to have a purchase turned down; or
- medical and legal referrals are not available from Visa Gold, Visa Platinum or commercial Visa cards;

c) the version of *Paris* stating that “Medical and legal referrals are not available through most Visa Classic cards” does not imply that there are no Visa Classic cards with these benefits.

d) none of the *Steve and Eydie* commercials implies that:

- there aren’t any versions of Visa cards that offer purchase protection;
- there aren’t any versions of Visa cards that offer car rental insurance; or
- Visa won’t help our cardholders who lose their cards;

e) The print advertisements concerning Travel Service Locations do not imply that Visa issuers do not offer services to their cardholders who lose their cards.

However, NAD also concludes that:

f) Amex does not have a reasonable basis to state in one version of *Paris* that “Medical and legal referrals not available through Visa Classic cards;”



g) the print advertisements concerning medical and legal referrals reasonably imply that these benefits are not available through Visa Classic cards; and

h) the print advertisements concerning mileage reasonably imply that mileage points on all Visa-affiliated airline programs expire.

Rationale: Comparison to the Visa brand instead of its issuers: NAD determined that Amex's comparison to "Visa" instead of one or more Visa issuers is neither gratuitously disparaging nor inaccurate. Anytime an advertiser claims that it can offer a feature that its competitors lack, it disparages, i.e., says something negative, about them, even when the claim is truthful. It is only the false and inaccurate comparison that will give rise to NAD's request that the advertising be modified.

The card used by the hapless traveler was obviously not a Visa Gold card or a Visa Platinum card as they are both readily identifiable: they are advertised separately from Classic cards, have an association with those colors, and are known as *Visa Gold* and *Visa Platinum*, not simply as Visa. Nor was the featured card a commercial card as such cards have corporate names and logos noticeably absent from the Visa cards of the campaign. By process of elimination, the only other card is the Visa Classic card and the so-called "generic" Visa Classic card used by the traveler is, in essence, a strawman representing the largest portion of Visa Classic cards.

As noted by Amex, the point of the campaign is to compare the benefits, services and programs of the basic American Express Card with those offered by the vast majority of basic Visa cards. It is not inaccurate to compare against a group of products, notwithstanding that they all have a trademark in common. Amex's campaign is similar in that respect to car rental advertising campaigns where comparisons may be made about brand-wide programs and specials even though many of the locations are owned by independent operators that may set their own lease terms. The advertiser in those circumstances needs only to disclose that the advertised special may not be available at all locations if that is the case. Amex has done the analogous thing in its campaign: it has made brand-wide claims that apply to all Visa cards unless stated otherwise.

*Benefit claims.~*

Visa communications studies: As it has in the past, NAD will use its experienced judgment to determine what express and implied claims have been made in the advertising at issue. In this instance, NAD had a number of concerns about Visa's communications studies (both of which followed the same design and used many of the same questions) that affected NAD's reliance upon them for determining the takeaway of the two commercials. They included:

- The "Visa" questions presupposed answers about *Visa* (whatever that name meant to the individual respondent) and what that "Visa" entity was cannot be assumed. Visa used the name "Visa" in each of the eight questions about "Visa" without any qualifier (e.g., Classic, Gold, etc.) despite the use of qualifiers in the commercials when comparative benefit claims were made. In using the unmodified word "Visa," this challenger did not observe any distinction between the Visa *card* and the Visa *organization* when asking the questions about benefits and programs notwithstanding its complaint that Amex did the same. And despite the fact that *Visa* (the member organization) does not offer or determine either programs and benefits for cardmembers, the respondents were nevertheless asked about *Visa* programs and *Visa* benefits.

- Questions intended to elicit answers about which card was involved in the commercials dominated the early stages of the interviews and may have impacted later answers if respondents thought it was not relevant to specify what they understood the name "Visa" meant in each question.

- The question, "...what specific types of Visa card or cards did the commercial depict or mention?" is ambiguous. Because individual issuers such as Citibank advertise their respective Visa cards, "type" can reasonably refer to

issuer type (i.e., Citibank Visa) as well as card type (i.e., Gold, Classic, Platinum). Therefore, it can not be concluded that the “don’t know” answer about which Visa “types were mentioned in the commercials necessarily meant the respondents didn’t know or recall a mention of Visa Classic cards or Visa Gold cards; it could have meant that the respondents didn’t know which, if any issuer was mentioned.

- The surveys used a relatively large number of total questions (21), employing as many as ten questions before inquiring into communications about “Visa “programs (questions were rotated). Some of the questions about “Visa” and “American Express” programs and benefits were repetitive, and some were posed in the positive while others were in the negative. The cumulative effect can be confusing to respondents.
- Visa made use of leading questions without filtering out respondents who did not receive messages on the particular question’s subject. This presupposes that there was any communication about that question’s subject, can encourage a response about a communication that wasn’t actually received, and invites the respondent to guess at an answer in order to appear cooperative.

Specifically mentioned benefits: NAD agrees with the challengers that humor is not a defense for misrepresentation. However, the use of humor can determine whether any claim is actually being made about a competitor or not. The main character in the commercials is a buffoon upon whom ill luck and the consequences of inattentiveness constantly fall. Each commercial presents a farce, not a slice-of-life with a particular issuer’s product, and the chances of all these particular misadventures happening to a real traveler within a single day are undoubtedly slim. NAD, therefore, concludes that each time one of the Visa-related disappointments occurs it does not constitute an express claim that the particular lack of service/benefit he learns of applies to all Visa Classic cards. Nevertheless, the commercials reasonably imply that the traveler’s particular experiences with his Visa card, i.e., a Visa Classic card that did not provide the particular services he needed, are those that are *likely* to befall one using a Visa Classic card rather than an American Express Card. With the limited exceptions as noted in the summary above, Amex’s comparisons were accurate and reasonably based in that the vast majority of issued Visa Classic cards do not come with the subject enhancements while the basic American Express Card does.

The fact that “millions” of Visa Classic cards have been issued that provide some of the benefits offered by the American Express Card does not affect the accuracy of Amex’s claims. A representation that “Product benefit X is not offered by most Y products” literally means that a majority of the whole Y *category* does not offer product benefit X. By inference it also means that “some” *do* offer it. Although millions of Visa Classic cardholders may get some of the benefits Amex touts for American Express cardholders, the fact remains that most Visa Classic cardholders do not.

For example:

- Car rental insurance, purchase protection, emergency medical services and emergency legal services and services for lost cards: Amex’s claims about these benefits were based on its benefit analysis of the top 25 Visa issuers. These data were not shown to contain material flaws as to those issuers (one correction was noted). It showed that: none offers emergency medical services; none offers emergency legal services as a standard benefit (the two that did offer it charge an extra fee); only one, Citibank, offers purchase protection; only two offer car rental insurance to all cardholders and the third, Citibank offers it only to the small portion of its customers enrolled in a co-branded airline program. Thus, not one of the top 25 issuers offers all the referenced benefits of an American Express Card to its Classic cardholders, Visa could not name a single issuer among the other 6000 that offers them all, only one of the top 25 offers two of the services, and the vast majority do not offer any. Lastly, neither Visa nor its issuers maintains any Travel Service office either in the US or internationally.

All but one of the commercial’s claims were thus accurate. The exception is “Medical and legal referrals not available through Visa Classic cards.” NAD agrees with the challengers that because a specific trademark is involved, the advertiser’s comparative claim should not have summarily excluded any portion of the mark’s business

even though it applied to only a small percent of it. This kind of claim differs from the accommodation generally allowed for a comparison to an entire category provided the market leaders and all but the smallest local providers (i.e., collectively about 85% of the market) have been accounted for in the claim's substantiation. A trademark is too specific because it identifies source and origin of products/services and even a relatively insignificant portion of a business line, i.e., less than one third of one percent, is identifiable because of the mark. That makes the claim expressly inaccurate as to those discounted. While the super, "Medical and legal referrals not available through most Visa Classic cards" is accurate, its alternate version is not. NAD also concludes that the footnote in the print advertising, "Information on Visa obtained from largest issuers" is inadequate as the word, "largest" does not convey information about the majority of the market. Although BA and another bank K among the top 25 issuers make legal referrals available, it is for an extra charge and need not be taken into account when comparing enhancements that are obviously basic rather than optional. NAD therefore requests that the super omitting "most" and footnote be modified.

- **Mileage:** Here again the advertiser's support was based on its benefit summary. Only four out of fourteen programs affiliated with Visa cards and 30% of the airline affiliated issued cards involve mileage that does not expire. It is a relevant comparison as mileage, although involving only a small percent of Visa cards, is a valuable benefit given the cost of air transportation that becomes free when the benefit is used. Although the commercial's claim in this area was accurate, neither print advertisement concerning frequent flyer programs discloses that some of the Visa-affiliated programs offer mileage that does not expire. Amex places too much emphasis on its correct use of the auxiliary verb, "can", in the phrase "Miles that can expire before you know it." (emphasis added) In this instance, properly phrased, grammatically correct English doesn't eliminate the day-to-day use of words such as "can" that, in context, reasonably convey not only ability but a definitive end result. NAD requests that this ambiguity be eliminated with copy disclosing that some Visa Classic cards are affiliated with programs whose mileage does not expire.

- **Credit limits:** Finally, NAD concludes that all the advertisements are accurate as to credit limit claims. There was no evidence of the relative likelihood of American Express or Visa cardholders being turned down for a purchase, and Visa's suggestion that the American Express cardholder would be the one to whom this would happen more often was speculative. The television commercial depicts only a person finding the limit has been exceeded in the course of an expensive transaction, an event that can happen to anyone who has not kept diligent records throughout a particular month of how much credit is left on his/her account. While the setting was a comparison of card enhancements and showed a disappointed traveler, it did not involve any information about the probability of such an event nor did it impliedly convey any impression about such probability. The print advertisements about credit limits do not involve a slice-of-life example of what happens when a consumer is faced with this. They accurately state that there is no preset spending limit for American Express cardholders, that there is a preset spending limit for Visa cardholders, and disclose what criteria Amex uses to approve purchases. It cannot, therefore, be reasonably concluded from these advertisements that American Express cardholders have no credit limits as that inference expressly contradicts the explanation of what the card's credit limits are based on.

Commercial supers: While the disclaimer supers were not as large as the positive benefit supers used by Amex to reinforce its claims, NAD concludes that they were clear, placed on contrasting backgrounds and remained on screen long enough to read them.

**Requested Modifications:** NAD requests that:

- the print advertisements concerning legal and medical referrals be modified to disclose that the claim applies to the majority of Visa Classic cards;
- the commercial claim that "Medical and legal referrals not available through Visa Classic cards" be modified to disclose that the claim applies to the majority of Visa Classic cards; and

- the print advertisements concerning mileage programs be modified to disclose that some Visa Classic cards are affiliated with programs whose mileage does not expire.

**Advertiser's Statement:** American Express is pleased that the NAD has upheld the central message of its advertising - that American Express fairly may compare its flagship green card to Visa's basic cards, and that the American Express card offers an array of services, including no pre-set spending limit, emergency medical and legal referrals, automatic purchase protection, car rental insurance, 1,700 travel service locations, and, for cardmembers in our Membership Rewards program, mileage points that never expire, that most basic Visa cards do not.

We acknowledge, as we did in our advertising, that a small number of Visa issuers may offer some of these features, and will be happy to make that even clearer in our future advertising. Accordingly, we will modify our advertising along the lines requested by NAD.

American Express is pleased to have participated in the self-regulatory process and thanks NAD for its detailed attention to this matter. (#3419 RRK, closed 11/12/97)